Supreme Court, U.S.
FILED
SEP 25 1996
CLERK

No. 96-140

In the Supreme Court of the United States

OCTOBER TERM, 1995

ZOFIA SOBOCINSKI, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's husband irrevocably elected to receive a reduced Civil Service Retirement System annuity to provide survivor benefits for his spouse upon his death.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unreported, but the decision is noted at 79 F.3d 1167 (Table). The decision of the Merit Systems Protection Board (Pet. App. 3-10) is unreported, but the decision is noted at 68 M.S.P.R. 535 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1996. The petition for a writ of certiorari was filed on June 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Although petitioner lists the Merit Systems Protection Board (MSPB) as an additional respondent, the MSPB was not a party in the court of appeals.

STATEMENT

An individual receiving an annuity under the Civil Service Retirement System (CSRS) who marries can, within two years of the marriage, irrevocably elect to receive a reduced annuity during his lifetime to provide survivor benefits to his spouse. 5 U.S.C. 8339(k)(2)(A).[2] John Sobocinski, who was then unmarried, retired under CSRS on January 1, 1975. Pet. App. 1. He and petitioner were married fourteen years later. *Ibid.* One year later, on January 31, 1990, Mr. Sobocinski changed his designation of beneficiary, listing his wife as his beneficiary for any lump-sum CSRS payment. *Id.* at 12.[3]

The Office of Personnel Management (OPM) then wrote to Mr. Sobocinski, stating:

> It has been noted that you have married since the date of your Civil Service Retirement.

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[2] Section 8339(k)(2)(A) provides in pertinent part:

> An employee or Member, who is unmarried at the time of retiring under a provision of law which permits election of a reduced annuity with a survivor annuity payable to such employee or Member's spouse and who later marries, may irrevocably elect, in a signed writing received in the Office within 2 years after such employee or Member marries * * * a reduction in the retired employee or Member's current annuity as provided in subsection (j) of this section.

[3] This change in beneficiary designation does not implicate any entitlement to survivor benefits, as the form expressly indicates (Pet. App. 12; App., *infra*, 1a), but rather entitles the named beneficiary to receive in a lump sum "the accrued annuity due for the days that [Mr. Sobocinski] lived in the month of his death." Pet. App. 17.

> In order to update our records, please provide our office with a copy of your marriage certificate. Since you may be entitled to elect a reduced annuity with survivor benefits to your spouse, you should indicate whether or not you wish to make such an election. We will then review your file and advise you of any change or elections that you are entitled to make.

Pet. App. 13. Mr. Sobocinski responded, providing information that OPM had requested and stating, "Marriage Certificate, and possibly a change in my annuity survivor benefits for my wife." *Id.* at 14.

OPM then wrote to Mr. Sobocinski, informing him of the amount by which his annuity would be reduced (approximately $80 per month) and the amount of the lump-sum payment that would be due ($16,048.07) under 5 U.S.C. 8339(k)(2)(B)(ii) if he elected to provide survivor benefits. Pet. App. 15; C.A. App. 26. OPM also enclosed a form to be used to make an election for survivor benefits. Pet. App. 15.[4] OPM received no response to this letter, and there is no evidence that Mr. Sobocinski completed the application for a reduced annuity with survivor benefits. *Id.* at 7, 15.

Mr. Sobocinski died three and one-half years later, and petitioner applied for survivor benefits. Pet. App. 1. OPM denied her request on the ground that her husband had not elected survivor benefits. *Id.* at 11, 15. This decision was affirmed by the Merit Systems Protection Board (MSPB) (*id.* at 3-10) and by the Court of Appeals for the Federal Circuit (*id.* at 1-2).

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[4] A copy of this form is attached hereto at App., *infra*, 3a-4a.

ARGUMENT

The decision of the court below is correct. The issue of whether substantial evidence supports the finding that petitioner's husband did not elect survivor benefits does not warrant review by this Court.

OPM properly denied petitioner's request for survivor benefits because her husband did not make the irrevocable election to provide those benefits required by 5 U.S.C. 8339(k)(2)(A). Petitioner argues (Pet. 5-6, 10) that her husband's execution of the change in beneficiary form to name her as his beneficiary (Pet. App. 12) constituted the required election. By its express terms, however, that form was not a designation of the survivor annuity benefits at issue here, but only of "any lump-sum benefit which may become payable under the Civil Service Retirement law after [Mr. Sobocinski's] death." *Ibid.*; App., *infra*, 1a. See 5 U.S.C. 8342. The form states that Mr. Sobocinski "understand[s] that this designation of beneficiary will not affect the rights of any survivors who may qualify for annuity benefits after my death." Pet. App. 12; App., *infra*, 1a.

Moreover, after Mr. Sobocinski signed and returned that form, OPM notified him that, in view of his marriage, he might be eligible to elect to provide survivor benefits by reducing the annuity he was then receiving and paying an additional deposit. Pet. App. 13. Mr. Sobocinski responded, not by stating that he had already made that election, but by indicating that he was considering "possibly a change in my annuity survivor benefits for my wife." *Id.* at 14. Petitioner contends (Pet. 5) that this statement should be construed to mean that Mr. Sobocinski wanted survivor benefits if possible. At best, however, his state-

ment was ambiguous, as the administrative judge found in holding that the statement did not constitute the requisite clear election by Mr. Sobocinski to reduce his current annuity benefits and provide survivor benefits. Pet. App. 8.

Petitioner cites (Pet. 4) OPM's decision on reconsideration of the initial OPM rejection of petitioner's claim. The reconsideration decision characterized Mr. Sobocinski's letter as "requesting survivor annuity benefits." Pet. App. 15. As the MSPB (*id.* at 8) and court of appeals (*id.* at 1-2) concluded, however, Mr. Sobocinski's letter was only the initial step in requesting such benefits. The process of providing Mrs. Sobocinski with survivor annuity benefits would have been completed only if Mr. Sobocinski had made an irrevocable election based on the information OPM had sent him regarding how much his current annuity would be reduced and what payment he would owe if he elected survivor benefits.[5] OPM's characterization is consistent with this view.

Moreover, after OPM advised Mr. Sobocinski of the amounts of his annuity reduction and deposit payment if he elected to provide survivor benefits and included a form for him to complete, Pet. App. 7, Mr. Sobocinski did not return the form, and he continued to accept his full annuity until his death more than three and one-half years later. In addition, he never made the

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[5] As part of this election for a reduced annuity benefit, Mr. Sobocinski would have needed to deposit an additional $16,048.07 in order to ensure that Mrs. Sobocinski received the maximum annuity rate of $1219 per month, an amount that was $79 less than the monthly annuity Mr. Sobocinski was receiving when OPM calculated these figures on April 16, 1990, in response to Mr. Sobocinski's correspondence. See C.A. App. 36.

payment necessary to qualify his wife for a survivor annuity.

Petitioner contends that Mr. Sobocinski's illness prevented him from completing the form, and she states that he had surgery four times between July 16 and October 12, 1990. Pet. 6-7; see also Pet. App. 18-25. The administrative judge correctly found, however, that petitioner failed to establish that her husband's condition prevented him from completing and returning the form, if he had so chosen, during the entire period from April 16, 1990, when OPM sent the form to him, until January 6, 1991, when the deadline to make the election expired. Pet. App. 8. In any event, 5 U.S.C. 8339(k)(2)(A) does not create an exception excusing annuitants from making the required election, even during periods of serious illness. At best, petitioner raises an equitable consideration, but such a factor cannot override a statutory requirement for civil service retirement benefits. See *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990); *Iacono* v. *Office of Personnel Management*, 974 F.2d 1326 (Fed. Cir. 1992).

Finally, petitioner argues (Pet. 5, 9-10) that the court's decision below conflicts with the MSPB's decision in *Lemp* v. *Office of Personnel Management*, 26 M.S.P.R. 549 (1985). Although any such conflict would not warrant this Court's review, *Lemp* in fact is consistent with the decision below. As the MSPB recognized in this case (Pet. App. 7), *Lemp* holds that an election of survivor benefits need not be on a particular form so long as the annuitant clearly indicates an intent to elect survivor benefits. For the reasons discussed above, the administrative judge correctly found that petitioner's husband never clearly expressed such an intention, and the court of appeals

correctly held that substantial evidence supports that finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

SEPTEMBER 1996

APPENDIX

WARNING—Do not fill out this form until you have read all instructions.	**DESIGNATION OF BENEFICIARY** CIVIL SERVICE RETIREMENT SYSTEM	STANDARD FORM NO. 2808 JUNE 1966 U.S. Civil Service Commission FPM Supplement 831-1 2808-104

A. INFORMATION CONCERNING THE DESIGNATOR

1. NAME (*Last*) (*First*) (*Middle*)	2. DATE OF BIRTH (*Month*) (*Day*) (*Year*)	3. SOCIAL SECURITY NUMBER
4. DEPARTMENT OR AGENCY IN WHICH PRESENTLY OR LAST EMPLOYED, INCLUDING BUREAU OR DIVISION		5. CLAIM NUMBER IF RETIRED CSA—

I, the employee or former employee identified above, canceling any and all previous designations of beneficiary heretofore made by me, do now designate the beneficiary or beneficiaries named below to receive any lump-sum benefit which may become payable under the Civil Service Retirement Act after my death. I understand that this designation of beneficiary will not affect the rights of any survivors who may qualify for annuity benefits after my death, and that this designation will remain in full force and effect unless or until canceled by me in writing.

B. INFORMATION CONCERNING THE BENEFICIARY OR BENEFICIARIES

TYPE OR PRINT FIRST NAME, MIDDLE INITIAL, AND LAST NAME OF EACH BENEFICIARY	TYPE OR PRINT ADDRESS (*Including ZIP Code*) OF EACH BENEFICIARY	RELATIONSHIP	SHARE TO BE PAID TO EACH BENEFICIARY (*See Example*)

I hereby direct, unless otherwise indicated above, that, if more than one beneficiary is named, the share of any deceased beneficiary or beneficiaries who may die before a lump-sum benefit becomes payable shall be distributed equally among the surviving beneficiaries, or entirely to the survivor. If none of the beneficiaries are alive when the lump-sum benefit becomes payable, this designation shall be void.

DATE OF THIS DESIGNATION (MONTH) (DAY) (YEAR) _____ (SIGNATURE OF DESIGNATOR—DO NOT PRINT) _____

C. WITNESSES (*A witness is ineligible to receive payment as a beneficiary*)

WE, THE UNDERSIGNED, CERTIFY THAT THIS INSTRUMENT WAS SIGNED IN OUR PRESENCE.

(SIGNATURE OF WITNESS—DO NOT PRINT)	(NUMBER AND STREET)	(CITY, STATE, AND ZIP CODE)
(SIGNATURE OF WITNESS—DO NOT PRINT)	(NUMBER AND STREET)	(CITY, STATE, AND ZIP CODE)

PRINT OR TYPE YOUR NAME AND ADDRESS (*Including ZIP Code*) TO INSURE RETURN OF COPY	(*Reserved for Receiving Stamp of U. S. Civil Service Commission*)
⌜ ⌝ ⌞ ⌟	

MAIL BOTH COPIES TO THE UNITED STATES CIVIL SERVICE COMMISSION,
BUREAU OF RETIREMENT AND INSURANCE, WASHINGTON, D.C. 20415

[This Duplicate Will Be Returned To You]
[Copy Omitted In Printing]

IMPORTANT.—The Filing of This Form Completely Cancels Any Designation You May Have Previously Filed. Be Sure To Name In This Form All Persons You Wish To Designate As Beneficiaries.

EXAMPLES OF DESIGNATIONS

HOW TO DESIGNATE ONE BENEFICIARY

TYPE OR PRINT FIRST NAME, MIDDLE INITIAL, AND LAST NAME OF EACH BENEFICIARY	TYPE OR PRINT ADDRESS *(Including ZIP Code)* OF EACH BENEFICIARY	RELATIONSHIP	SHARE TO BE PAID TO EACH BENEFICIARY
SARAH M. JONES	22 Elm Street Lima, Ohio 45801	Sister	All

Do not write name as S. M. Jones or as Mrs. George L. Jones.

HOW TO DESIGNATE MORE THAN ONE BENEFICIARY

TYPE OR PRINT FIRST NAME, MIDDLE INITIAL, AND LAST NAME OF EACH BENEFICIARY	TYPE OR PRINT ADDRESS *(Including ZIP Code)* OF EACH BENEFICIARY	RELATIONSHIP	SHARE TO BE PAID TO EACH BENEFICIARY
MARY A. SMITH	4902 Oak Street Judson, North Dakota 58548	Aunt	One-half
ANNA D. BROWN	50 Duke Street Judson, North Dakota 58548	Cousin	One-fourth
HENRY G. BROWN	50 Duke Street Judson, North Dakota 58548	Cousin	One-fourth

Be sure the shares to be paid to the beneficiaries add up to 100%.

HOW TO DESIGNATE A CONTINGENT BENEFICIARY

TYPE OR PRINT FIRST NAME, MIDDLE INITIAL, AND LAST NAME OF EACH BENEFICIARY	TYPE OR PRINT ADDRESS *(Including ZIP Code)* OF EACH BENEFICIARY	RELATIONSHIP	SHARE TO BE PAID TO EACH BENEFICIARY
CATHERINE J. ANDERSON, if living	91 Adams Avenue Syracuse, New York 13206	Niece	All
Otherwise to: JOHN L. JONES	69 Harris Avenue Cleveland, Ohio 44104	Nephew	All

HOW TO CANCEL A DESIGNATION OF BENEFICIARY

TYPE OR PRINT FIRST NAME, MIDDLE INITIAL, AND LAST NAME OF EACH BENEFICIARY	TYPE OR PRINT ADDRESS *(Including ZIP Code)* OF EACH BENEFICIARY	RELATIONSHIP	SHARE TO BE PAID TO EACH BENEFICIARY
Cancel Prior Designation			

You may want to cancel a beneficiary you have named if your circumstances change and you want the benefit payable to your wife or husband, children, or parents in that order.

Form Approved
OMB NO. 3206-0174

Decision About a Survivor Annuity for a Current Spouse

Important: Please print your name and provide your CSA number.	
Your name	CSA number
Please provide the following information about the spouse who is to receive the survivor benefit.	
Spouse's name	Social Security Number
Spouse's date of birth	Date of marriage *(your election must be received within two years of this date)*

Write your initials by your election and provide your signature:

[ ] I elect the maximum survivor benefit.

[ ] I elect a monthly survivor benefit of $ [ ] (Specify a whole dollar amount.)

3a I read and understood the information provided in the accompanying letter. I understand that this election cannot be changed or revoked once it is received by the Office of Personnel Management and that a portion of the reduction in my annuity is permanent.

Provide your signature for the above election	Date	Telephone number

If you decide not to provide a survivor benefit for your spouse: If, after reading the information in the accompanying letter, you decide not to provide a survivor benefit, please indicate your decision by writing your initials on the line below and provide your signature. Please note that you may change your mind and elect to provide a survivor benefit for your current spouse only if you again notify us in a signed notification that is received within two years after the date of your marriage.

[ ] I have read the enclosed information and have decided not to provide a survivor benefit. My signature is provided below.

Signature	Date

Where to send this form: Send the completed election to: Office of Personnel Management, Retirement Operations Center, ATTN: PRM-STOP, Boyers, PA 16017.

The Privacy Act and Public Burden Statements are provided on the reverse side.

Previous editions are not usable.

RI 20-63
Rev. April 1994

Privacy Act and Public Burden Statements

Chapter 83, title 5, U.S. Code, authorizes solicitation of this information. The data you furnish will be used to determine your eligibility to receive a reduced annuity and to give a survivor annuity to your spouse.

This information may be shared and is subject to verification, via paper, electronic media, or through the use of computer matching programs, with national, state, local, or other charitable or social security administrative agencies to determine and issue benefits under their programs, to obtain information necessary for determination or continuation of benefits under this program, or to report income for tax purposes. It may also be shared and verified, as noted above, with law enforcement agencies when they are investigating a violation or potential violation of civil or criminal law.

Provision of this information is voluntary; however, failure to supply all of the requested information may result in an inability to reduce your annuity for your spouse.

We also request that you provide your spouse's Social Security number so that it may be used as an individual identifier in the Civil Service Retirement System. Executive Order 9397, dated November 22, 1943, allows Federal agencies to use the Social Security number as an individual identifier to distinguish between people with the same or similar names.

We think this form takes an average 20 minutes per response to complete, including the time for reviewing instructions, getting the needed data, and reviewing the completed form. Send comments regarding our estimate or any other aspect of this form, including suggestions for reducing completion time, to the Office of Management and Budget, Paperwork Reduction Project, (3206-0174), Washington, D.C. 20503.